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KOPERASI PERMODALAN FELDA MALAYSIA BHD v. ICON CITY DEVELOPMENT SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
LEE HENG CHEONG JCA
B MARIANA YAHYA JCA
[CIVIL APPEAL NO: W-02(NCvC)(W)-2606-12-2018]
3 JANUARY 2023

C **Abstract** – *The tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object or, if not in itself unlawful, it must be brought about by unlawful means. There must be a co-existence of an agreement with an overt act causing damage to the claimant. Hence, the tort of conspiracy is complete only if the agreement is carried into effect, subsequently causing damage to the claimant.*

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CONTRACT: *Agreement – Sale and purchase agreement – Breach – Parties entered into sale and purchase agreements for purchase of properties – Failure of developer to deliver vacant possession – Claim by purchaser for liquidated ascertained damages – Whether there was extension of time by architect to allow construction of properties to be completed and for vacant possession to be handed over to purchaser – Whether there was breach of terms of sale and purchase agreements*

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TORT: *Conspiracy – Breach of duty – Parties entered into sale and purchase agreements for purchase of properties – Failure of developer to deliver vacant possession – Claim by purchaser for liquidated ascertained damages – Whether architect issued extension of time in favour of developer – Whether there was conspiracy between architect and developer to injure purchaser – Whether tort of conspiracy established*

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G The appellant had purchased eight properties from the first and second respondents, who were the development project's developer and architect, respectively. However, the first respondent failed to deliver vacant possession of the properties, prompting the appellant to claim for liquidated ascertained damages ('LAD') against the respondents at the High Court. The appellant's cause of action against (i) the first respondent was founded upon the latter's breach of eight sale and purchase agreements ('SPAs') in relation to the properties and the tort of conspiracy; while (ii) the second respondent was founded upon the torts of conspiracy and negligence for the breach of duty of care as the project architect. Dismissing the claim, the High Court Judge ('HCJ') held that (i) the delay in handing over the vacant possession by the first respondent was based on the extension of time granted by the

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second respondent and such extension was not in breach of contract and the appellant had no right to claim for damages for the delay; (ii) by virtue of cl. 13.1.1 of the SPAs, together with the certificate of completion and compliance ('CCC'), cl. 13.2.1 of the SPAs meant that vacant possession of the properties did not have to be given at the same time of the issuance of the CCC. Therefore, the first respondent did not breach the terms of the SPAs when the CCC was issued after the granting of the vacant possession; (iii) the architect's letters, extending the period of handing over the vacant possession of the properties, were properly issued by the second respondent and did not violate his fiduciary duty as the project architect; (iv) the appellant failed to prove the existence of a conspiracy between the respondents; and (v) the second respondent granted the extension of time based on the circumstances that required it and he was not negligent in granting so. Hence, the present appeal.

Held (allowing in part appeal against first respondent; dismissing appeal against second respondent)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The HCJ erred in construing the architect's letters as extension of time under the SPAs when it was clear from an interpretation of the letters that they were not, as they did not state: (i) the SPAs, specifically cl. 13.1.1, which the respondent relied heavily upon; (ii) the architect's opinion that the events in the letters were beyond the developer's control or events which fell within any of the grounds in cl. 13.1.1 or were *force majeure* events; and (iii) any opinion at all. They merely stated that there would be delays in the completion of the construction works. As such, the architect's letters did not qualify as valid certificates of extension of time which would justify the first respondent's delay in delivering the vacant possession of the properties to the appellant. (paras 28 & 29)

(2) The appellant had successfully discharged its burden of proof that there was a breach of contract and that the SPAs contained a clause specifying a sum to be paid upon breach, which was cl. 13.1.2 of the SPAs, read with s. 7 of Schedule A of the SPAs. Under the SPAs, the agreed rate of the LAD was 10% per annum of the purchase price of the properties, which was similar to the rate of the LAD awarded in statutorily prescribed SPAs such as sch. G or H of the Housing Development (Control and Licensing) (Amendment) Act 2012. Therefore, such a rate of LAD was fair and reasonable. (paras 42 & 43)

(3) The 'overt act' in furtherance of conspiracy, which was pleaded by the appellant, was that the second respondent had issued the extension of time of the project in favour of the first respondent. By granting the extension of time to the first respondent, the second respondent was

merely carrying out his contractual duty. The performance of the contractual duty of the second respondent as the project architect could not amount to an overt act in furtherance of a conspiracy. There was no merit in the contention. There was also no credible evidence adduced by the appellant to prove that there was a conspiracy between respondents to injure the appellant. The only evidence adduced by the appellant to support its case for conspiracy were the letters between the appellant and the respondents. However, such letters were insufficient to prove the tort of conspiracy at all. The appellant failed to prove the essential elements of the tort of conspiracy against the respondents. (paras 46-48)

Case(s) referred to:

Araprop Development Sdn Bhd v. Leong Chee Kong & Anor [2008] 1 CLJ 135 CA ***(refd)***
Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389 CA ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), s. 176
Contracts Act 1950, s. 75

For the appellant - Joshua Chong Wan Ken, Khor Yongshi & Chan Jia Her; M/s Raja Darryl & Loh
For the 1st respondent - Justin Voon Tiam Yu, Lee Chooi Peng & Lim Xin Yi; M/s Justin Voon Chooi & Wing
For the 2nd respondent - Edwin Lim Hock Lee & Ng Sim Hong; M/s Edwin Lim & Suren

[Editor's note: For the High Court judgment, please see Koperasi Permodalan Felda Malaysia Bhd v. Icon City Development Sdn Bhd & Anor [2020] 1 LNS 1635 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Lee Heng Cheong JCA:

Introduction

[1] The appellant appeals against the decision of the High Court in dismissing the appellant's claims against the first and second respondents for the damages for delay in delivery of vacant possession of eight units of eight-storey shop offices (collectively "the said properties") under the Icon City project ("the said project") and for the torts of conspiracy and negligence.

[2] The appellant was plaintiff in the High Court, and the appellant's claim was for liquidated ascertained damages ("LAD") for late delivery of vacant possession of the said properties bought from the first respondent (the first defendant below) who was the project developer, and also against the second respondent, (the second defendant below) who was the project architect of the said project.

[3] This is an unanimous decision of the court. We heard this appeal on 6 May 2021 and allowed the appeal in part. These are our grounds for our decision.

[4] The parties herein shall be referred to, in their respective capacities before this court.

Background

[5] As a result of the first respondent failing to deliver the valid vacant possession of the said properties, the appellant filed a suit in the High Court, against the first and second respondents claiming for the following reliefs:

(i) a declaration that the delay or cessation of work by a third party or contractor/sub-contractor appointed by the first respondent is within the first respondent's control;

(ii) a declaration that the opinion/recommendation by the second respondent to delay or extend the completion date and date of delivery of vacant possession is wrongful, invalid, improper and/or not *bona fide* and not applicable;

(iii) a declaration that the appellant is entitled to claim for damages for the delay of the first respondent in the completion of works and delivery of vacant possession for the units purchased by the appellant as the opinion/recommendation of the second respondent to delay or extend the completion date and the date of delivery of vacant possession is wrongful, invalid, improper and/or not *bona fide* and not applicable;

(iv) LAD for delays in delivery of vacant possession in the sum of RM3,710,465.75 calculated from 5 June 2015 to 30 December 2015 to be paid by the first respondent and/or the second respondent jointly and severally;

(v) damages for delays in delivery of vacant possession in the sum of RM2,550,425.36 calculated from 31 December 2015 to 26 August 2016 to be paid by the first respondent and/or the second respondent jointly and severally;

(vi) general damages;

(vii) interest at the rate of 5% per annum on all judgment sums from the date of judgment until full realisation; and

(viii) costs.

[6] The appellant's cause of action against the first respondent developer is founded upon the first respondent's breach of the eight sale and purchase agreements all dated 21 October 2011 in relation to the said properties (collectively "SPAs") and the tort of conspiracy. The terms and conditions of the eight SPAs are identical save for the details and descriptions of the said properties. The appellant's cause of action against the second respondent, is founded upon the torts of conspiracy and negligence for the breach of duty of care as the architect for the said project.

[7] Under the terms of the SPAs, the date by which the first respondent had to deliver vacant possession of the said properties was on or before 4 June 2015. However, vacant possession of the properties was not delivered on or before 4 June 2015. Both these facts are not in dispute.

[8] The first respondent issued a letter dated 30 December 2015 to the appellant informing that vacant possession of the said properties was ready to be delivered, when in fact it was not, as the Certificate of Completion and Compliance ("CCC") was not ready as the water connection, electricity connection and full access road ("Essential Amenities") were not ready at the material time.

[9] The first respondent relied on the second respondent architect's letters dated 14 August 2015 and 21 December 2015 (collectively "the architect's letters") respectively, which the first respondent claimed were issued pursuant to cl. 13.1.1 of the SPAs. Clause 13.1.1 of the SPAs permits the architect (*ie*, the second respondent) to issue extensions of time for inter alia "*force majeure*" or "act of God") type causes beyond the first respondent's control, wherein the first respondent would not be liable for liquidated damages for such extension of time.

[10] The first respondent relied on the architect's letters to extend the original contractual completion date of the said properties from the original date of 4 June 2015 to 15 January 2016 pursuant to cl. 13.1.1 of the SPAs.

[11] The CCC was forwarded to the appellant by the first respondent *vide* a letter dated 2 September 2016.

[12] In this connection, the appellant does not accept that valid vacant possession of the said properties was handed over in January pursuant to this letter dated 30 December 2015, since it could not legally occupy the properties until the CCC was issued on 26 August 2016. The appellant took the position that LAD only stopped running on 26 August 2016.

The Findings Of The Learned High Court Judge

[13] After full trial, the learned trial judge ("the learned High Court Judge") found that the first and second respondents are not liable for the appellant's claim for Liquidated Ascertained Damages ("LAD") and that the

first respondent was entitled to rely on the architects' letters for extensions of time for the appellant to deliver vacant possession of the said properties. The learned High Court Judge further *inter alia* held as follows:

(i) that the extension of time granted by the second respondent is valid and in order based on the existence of the prevailing situation. Further, the second respondent has reasonably given an extension of time to allow construction of the said properties to be completed and for vacant possession to be handed over to the appellant;

(ii) that the delay in handing over the vacant possession by the first respondent was based on extension of time which was granted by the second respondent and such extension is not in breach of contract and the appellant has no right to claim for damages for delay;

(iii) by virtue of cl. 13.1.1 of the SPAs together with CCC, cl. 13.2.1 of the SPAs means that vacant possession of the said properties does not have to be given at the same time of the issuance of the CCC;

(iv) thus, the first respondent did not breach the terms of the SPAs when the CCC was issued after the granting of the vacant possession. Even if there is a breach of contract regarding the delivery of the CCC, the appellant have failed to prove the loss they have suffered namely for loss of rental profit and/or investment that could be obtained from the building but could not be obtained because the CCC was issued late; and

(v) that the appellant has to prove the damages and it is clear that the said properties cannot be rented after the CCC was issued. Thus, the loss of rental and investment profits are not solely due to the delay in obtaining the CCC.

Conspiracy Claim

(vi) the appellant's claim against the second respondent is based on the tort of conspiracy between the second respondent and the first respondent, to cause losses to the appellant by issuance of the architects' letters which in turn will cause time for delivery of vacant possession and issuance of CCC to be delayed to the detriment of the appellant;

(vii) that the architect's letters extending the period of handing over the vacant possession of the said properties issued by the second respondent was properly issued and did not violate his fiduciary duty as the project architect;

(viii) that the appellant failed to prove the existence of a conspiracy between the two respondents. The position of the second respondent as the architect of the project is to ensure that the construction is carried out according to the specified specifications. As the architect of the said

project, the second respondent is also expressly authorised to extend the delivery period property of empty based cl. 13.1.1. of the SPAs. The second respondent has the duty to extend the period if the circumstances provided for in the said cl. 13.1.1 occur. Further, the second respondent has reasonable grounds to grant an extension that time;

(ix) that the second respondent granted the extension of time based on the circumstances that required it and that the extension was given reasonably. Thus, the second respondent did not breach the duty of care he owed to the appellant when granting the extension that time; and

(x) that the second respondent was not negligent when he granted the extension of time and the appellant has failed to discharge the burden of proof in proving the second respondent's negligence.

The Appellant's Contentions

[14] Before us, the appellant contended *inter alia* as follows:

(i) the architect's letters cited disputes or issues arising between the first respondent and its contractor, which cannot be a cause beyond the first respondent's control as defined in cl. 13.1.1 of the SPAs;

(ii) the architect's letters were wrongfully issued and not pursuant to the SPAs;

(iii) the architect's letters were issued as a result of a conspiracy by the first and second respondents for the first respondent to evade liability to pay delay damages to the purchasers of the said project;

(iv) as the architect's letters issued by the architect were invalid or inapplicable, the first respondent is not entitled to rely on the architect's letters to extend the specified period under the SPAs and is not discharged of its liability to pay liquidated damages to the appellant;

(v) the first respondent is not entitled to rely on cl. 13 of the SPAs to extend the date of delivery of vacant possession of the said properties to the appellant, as the financial difficulty allegedly faced by the original main contractor was not "any other causes beyond the developer's control" within contemplation of cl. 13.1.1 of the SPAs;

(vi) the first respondent had control over the original main contractor but simply failed to exercise that control by doing nothing in the face of extensive and continued delays;

(vii) there is conspiracy between the first and second respondents in the issuance of the architect's letters to deny the appellant of its rights to LAD for delays in delivery of vacant possession of the said properties under the SPAs; and

(viii) the architect's letters were not extensions of time under the SPAs in either form or substance. In any event, the architect's letters were issued by the second respondent and are wrongfully, invalidly, improperly issued and in breach of the second respondent's duty of care towards the appellant as the purchaser of the properties.

The First Respondent's Contentions

[15] The first respondent contended before us, as follows:

(i) that there were extensions of time granted by the architect, the second respondent which was pursuant to cl. 13.1.1 of the SPAs which extended the time for the first respondent to deliver vacant possession of the said properties until 15 January 2016, hence absolving the first respondent of liability for the appellant's claim;

(ii) on 30 December 2015, the first respondent issued a letter informing the appellant that the properties are ready for delivery of vacant possession and the appellant would be deemed to have taken the possession within 14 days from the date of the letter (which would be 13 January 2016);

(iii) the first respondent relied on the architect's letters which extended the original contractual completion date from the original 4 June 2015 to 15 January 2016 pursuant to cl. 13.1.1 of the SPAs;

(iv) the architect's letters cited breaches by the main contractor and disputes or issues arising between the first respondent and its main contractor as causing delay in the completion of the said project. The architect's letters also made a reference to an application by the main contractor pursuant to s. 176 of the Companies Act 1965; and

(v) the CCC was forwarded to the appellant by the first respondent *vide* letter dated 2 September 2016.

The Second Respondent's Contentions

[16] The second respondent contended *inter alia* as follows:

(i) that the second respondent does not owe a duty of care to the appellant as it is merely the architect for the said project; and

(ii) there is no conspiracy between the first and second respondents.

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Our Analysis And Decision

[17] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 the Court of Appeal held as follows:

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> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

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[18] In the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, the Federal Court held that:

> [12] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention *ie*, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

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[19] In the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, Zabariah Mohd Yusof FCJ delivering the judgment of the court, held *inter alia* as follows:

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> (1) *An appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records.* In the UK, the test adopted by the appellate courts is not whether the higher courts feels that it would have reached a different conclusion on the same fact as the trial court, but *whether or not the decision by the lower court on findings of fact was reasonable. If the trial judge's decision can be reasonably explained and justified, then the appellate courts should refrain from intervention.* (paras 33, 34 & 60)

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> (2) *The court in Henderson separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test: (i) a material error of law; (ii) a critical finding of fact which has no basis in the evidence; (iii) demonstrable*

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misunderstanding of relevant evidence; and (iv) a demonstrable failure to consider relevant evidence. The phrase 'lack of judicial appreciation of evidence' used in Gan Yook Chin & Anor v. Lee Ing Chin & Ors could very well encompass three out of four errors of a trial judge identifiable in Henderson. Whilst there was a slight difference in the approach of the appellate intervention, both the UK Supreme Court and the Federal Court effectively shared a common thread where it had been held that appellate intervention was justified where there is lack of judicial appreciation of evidence. What is pertinent is that the 'plainly wrong' test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. (paras 54, 72, 74 & 76)

(3) *An appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. …*

(4) … (9) …

(10) *Henderson* was not setting any guidelines to the plainly wrong test. It merely provided a construction as to what amounts to the 'plainly wrong' test in an appellate intervention. Rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test should be retained as a flexible guide for appellate courts. …" (emphasis added)

[20] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellant's appeal.

[21] It is not in dispute between the parties that the specified period in the SPAs ended on 4 June 2015 ("contractual completion date") and that contractually, that was the date the first respondent was obliged to deliver vacant possession of the said properties. It is also not in dispute that the said properties were not completed or delivered to the appellant on the contractual completion date of 4 June 2015.

[22] The appellant alleged that this non-completion was a breach and the first respondent was liable to pay the LAD and/or damages from 4 June 2015 until date of CCC, *ie*, on 26 August 2016.

[23] The clause which is the subject matter of the dispute is cl. 13 of the SPAs on the "Time and Manner of Delivery of Vacant Possession", which is reproduced here:

13.1 Delivery of vacant possession

13.1.1 The Developer shall complete and deliver vacant possession of the said Parcel in accordance with the terms and conditions of this Agreement within the period stated in section 10 of Schedule A hereto PROVIDED THAT if in the opinion of the Developer's architect completion or delivery of vacant possession of the said Parcel is delayed by reason of exceptionally inclement

weather, civil commotion, strikes, lockout, war, fire, flood or for any other cause beyond the Developer's control or by reason of the Purchaser requiring the execution of any addition, works or alterations to the said Parcel, then in any such cases, the Developer's architect shall make a fair and reasonable extension of time for completion of the said Parcel and delivery of vacant possession hereunder.

13.1.2 In the event the Developer shall fail to complete and deliver vacant possession of the said Parcel to the Purchaser within the aforesaid period or within such extended time as may be allowed by the Developer's architect under Clause 13.1.1 the Developer shall pay to the Purchaser liquidated damages to be calculated from day to day at the Agreed Rate on such part of the Purchase Price that has been paid by the Purchaser to the Developer and such sums shall be calculated from the date of expiry of the period stated in Section 10 of Schedule A hereto or the extended date, as the case may be, to the actual date of delivery of vacant possession of the said Parcel to the Purchaser.

13.1.3 For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

13.2 Manner of vacant possession

13.2.1 Upon issuance of a certificate by the Developer's architect certifying that the construction of the Said Parcel has been duly competed and the Purchaser having paid all monies payable under this Agreement and having performed and observed all terms and conditions on the Purchaser's part under this Agreement, the Developer shall let the Purchaser into possession of the said Parcel.

PROVIDED ALWAYS THAT such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel or to make any alterations additions or otherwise to the said Parcel until such time as the Certificate of Completion and Compliance for the said Parcel is issued.

13.2.2 Upon the expiry of fourteen (14) days from the date of notice from the Developer requesting the Purchaser to take possession of the said Parcel whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession of the said Parcel and the Developer shall thereafter not be liable for any loss and/or damage to the said Parcel or to the fixtures and fittings therein.

(emphasis added)

Whether The Second Respondent's Architect's Letters Are Valid Extensions Of Time Under The SPAs?

[24] Clause 13.1.1 of the SPAs states that the first respondent must deliver vacant possession of the said properties within 36 months from the date of the period approval or the extended period approval ("specified period"). The exception to this general rule in the SPAs is that, if in the opinion of

the architect, delivery of vacant possession of the said properties is delayed by reason of exceptional causes as stated in cl. 13.1.1, then, the architect shall grant a fair and reasonable extension of time in favour of the first respondent.

[25] Clause 13.1.2 of the SPAs further states that in the event that the first respondent fails to deliver vacant possession of the said properties within the specified period (or the extended time allowed by the architect), the first respondent shall pay to the appellant, liquidated damages at the rate of 10% of the purchase price per annum on daily rests pursuant to the SPAs. These liquidated damages would start from the specified period to the actual date of delivery of vacant possession of the said properties to the appellant.

[26] Further, according to cl. 25.1 of the SPAs, the first respondent shall be responsible for connecting and applying for connection of utilities and services which serves the said properties (water, electricity, sewerage, telephone, as piping, sanitary, cooling ducts and so on), at its own cost and expense.

[27] It is undisputed that the specified period in the SPAs ends on 4 June 2015. The first respondent's contention is that there were extensions of time granted by the architect pursuant to cl. 13.1.1 of the SPAs by way of the architect's letters which extended the time for the first respondent to deliver vacant possession until 15 January 2016.

[28] We are of the considered opinion that the learned High Court Judge had erred in construing the architect's letters as extensions of time under the SPAs when it is clear from an interpretation of the architect's letters that they are not, on the following grounds:

(i) the architect's letters make no mention of the SPAs and specifically cl. 13.1.1 of the SPAs which the first respondent relies heavily upon;

(ii) the architect's letters do not state that in the opinion of the architect, the events in the said letters were events beyond the Developer's control or events which fall within any of the grounds in cl. 13.1.1 or were *force majeure* events; and

(iii) the architect's letters do not state any opinion at all and merely state that there would be delays in the completion of the construction works.

[29] As such, we are of the opinion that the architect's letters do not qualify as valid Certificates of Extension of Time which would justify the first respondent's delay in delivering the vacant possession of the said properties to the appellant.

[30] We also find that the first respondent's claims that the breaches by their main contractor, Sara-Timur Sdn Bhd and its application for restructuring pursuant to s. 176 of the Companies Act 1965 were events beyond its control to which it was entitled to extensions of time, has no

merits. The breaches caused by the main contractor's restructuring exercise were not *force majeure* events and were not beyond the first respondent's control in the said project under cl. 13.1.1 of the SPAs.

[31] In *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135, the Court of Appeal *inter alia* held that delay caused by the sub-contractor was not a circumstance beyond the vendor's control.

> [29] Going through the evidence and as pleaded by the appellant itself, the delay was caused by laying the electrical and telephone cable late. I agree with the conclusion of the learned trial judge that the delay as pleaded is not a delay as stipulated by cl. 22 of the S&P. *The delay in the present appeal was by the appellant's subcontractors who were under the control of the appellant. The S&P clearly provides for a completion date and I believe this is also true in the sub contracts with TNB and Maxis. The appellant could terminate the sub-contracts when it became obvious that the sub-contractors could not complete the works within the stipulated time. As it was the appellant did nothing and now uses cl. 22 of the S&P as an excuse for the delay.*
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> [30] For the reasons stated above, I agree with the learned trial judge that the delay was not a delay within the exclusion cl. 22 of the S&P.
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> (emphasis added)

[32] The Court of Appeal in the above case clearly showed that contractors are under the control of their employers, and the employer such as the first respondent cannot utilise their contractor's breaches or defaults, to gain extension of time.

When Was Vacant Possession Of The Said Properties Delivered To The Appellant?

[33] On 30 December 2015, the first respondent issued a letter bearing the same date, informing the appellant that the said properties are ready for delivery of vacant possession, enclosing a Certificate of Completion from the architect and that the requirements for vacant possession under cl. 13.2.1 of the SPAs have been met.

[34] Pursuant to cl. 13.2.2 of the SPAs, the appellant would be deemed to have taken the possession of the said properties within 14 days from the date of the letter, which would be 13 January 2016.

[35] We further find that the learned High Court Judge should not have interpreted the SPAs in such a manner that combined the two separate and distinct events into a single event when they are not. There is no statutory prohibition against the segregation of these two events. The appellant and the respondent have voluntarily entered into the SPAs and parties have conducted their affairs in accordance with the terms and conditions of the SPAs. The sanctity of the contract entered between parties should be preserved.

[36] We are of the considered view that the granting of "vacant possession" of the said properties without the right to occupation is nothing novel as even in the sale of "housing accommodation", the previous Schedule H of the Housing Development (Control and Licensing) Regulations 1989 (before the amendments *vide* PU(A) 106/15 which came into force on 1 February 2011 included a clause for vacant possession without according a right to occupation in cl. 27(3) of the statutory Sale and Purchase Agreement as follows:

> (3) Such possession shall not give the Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

[37] Our considered view is that there is merit in that the appellant's contention that cl. 13 of the SPAs merely requires the appellant to physically complete works and provide a certificate of practical completion by the architect as sufficient to provide vacant possession and that it would matter not, if the said properties was not connected with the Essential Utilities.

Whether The Respondent Needed To Prove Damages?

[38] The appellant contended that the learned High Court Judge erred in holding that the appellant failed to prove damages.

[39] Whether the damage is quantifiable or otherwise, the court has to adopt a common-sense approach by taking into account the genuine interest which an innocent party may have and the proportionality of a damages clause in determining reasonable compensation.

[40] Section 75 of the Contracts Act 1950 provides that reasonable compensation must not exceed the amount so named in the contract. Consequently, the impugned clause that the innocent party seeks to uphold would function as a cap on the maximum recoverable amount.

[41] Guidance can be found in the Federal Court's decision in *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723, where Richard Malanjum (CJ (Sabah & Sarawak) (as he then was") held *inter alia* as follows:

> *[70] We turn now to the issue on burden of proof. The initial onus lies on the party seeking to enforce a clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven, subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.*

[71] If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause is unreasonable or to demonstrate from available evidence and under such circumstances what comprises reasonable compensation caused by the breach of contract. Failing to discharge that burden, or in the absence of cogent evidence suggesting exorbitance or unconscionability of the agreed damages clause, the parties who have equality of opportunity for understanding and insisting upon their rights must be taken to have freely, deliberately and mutually consented to the contractual clause seeking to pre-allocate damages and hence the compensation stipulated in the contract ought to be upheld.

[72] It bears repeating that the court should be slow to refuse to give effect to a damages clause for contracts which are the result of thorough negotiations made at arm's length between parties who have been properly advised. …

[73] At any rate, to insist that the innocent party bears the burden of proof to show that an impugned clause is not excessive would undermine the purpose of having a damages clause in a contract, which is to promote business efficacy and minimise litigation between the parties (see: *Scottish Law Commission, Discussion Paper on Penalty Clauses (Discussion Paper No 103)*, December 1997, paras. [5.30] to [5.40]).

[74] In summary and for convenience, the principles that may be distilled from hereinabove are these:

(i) If there is a breach of contract, any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer. But a deposit paid which is not merely part- payment but also as a guarantee of performance is generally not recoverable.

(ii) Whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of a case, and the usual principles of interpretation apply. Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part- payment, it is a deposit.

(iii) A deposit is subject to s. 75 of the Act.

(iv) In determining what amounts to "reasonable compensation" under s. 75 of the Act, the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish* (*supra*) are relevant.

(v) A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.

(vi) **Section 75 of the Act** allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.

(vii) The initial onus lies on the party seeking to enforce a damages clause under **s. 75 of the Act** to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

(viii) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable. (emphasis added)

[42] From the evidence adduced, we are of the view that the appellant has successfully discharged its burden of proof, firstly, that there was a breach of contract and that secondly, the SPAs contained a clause specifying a sum to be paid upon breach which is cl. 13.1.2 of the SPAs read with s. 7 of Schedule A of the SPAs. See: *Cubic Electronics Sdn Bhd (in liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723.

[43] In the present case, under the SPAs, the agreed rate of LAD is 10% per annum of the purchase price of the said properties office, which is similar to the rate of liquidated damages awarded in statutorily prescribed sale and purchase agreements such as Schedule G or H of the Housing Development (Control and Licensing) (Amendment) Act 2012. Thus, we are of the view that such a rate of LAD is fair and reasonable.

The Conspiracy Claim

[44] The appellant then brought an action for declaration that the extension of time is invalid, liquidated damages ("LAD") for late delivery, and damages for purported late issuance of CCC to be paid by the first respondent and/or second respondent jointly and/or severally.

[45] In *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393, the Court of Appeal held that the standard of proof for conspiracy is very high and it means beyond reasonable doubt. The plaintiff must establish the following to succeed in their claim for conspiracy:

The tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means: see *Davies v. Thomas*

A [1920] 2 Ch 189 per Warrington LJ, and *Seah Siang Mong v. Ong Ban Chai & Another Case* [1998] 1 CLJ Supp 295 (HC) per Ghazali J (now FCJ). There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must
B establish:

(a) an agreement between two or more persons;

(b) for the purpose of injuring the plaintiff, and

(c) acts done in the execution of that agreement resulted in damage to
C the plaintiff: *Marrinan v. Vibart* [1962] 1 All ER 869 at p 871 per Salmon J; and *Halsbury's Laws of England* (4th Ed) Vol 45 at p. 271, as applied by Ghazali J (now FCJ) in *Seah Siang Mong.*

(emphasis added)

[46] We noted that the "overt act" in furtherance of conspiracy pleaded at
D para. 36 of the statement of claim is that the second respondent had issued the extension of time of the said project in favour of the first respondent. We are of the considered view that by merely granting the extension of time to the first respondent, the second respondent was merely carrying out his contractual duty. The performance of the contractual duty of second
E respondent as the project architect cannot amount to an overt act in furtherance of a conspiracy. Thus, we find that this contention has no merit.

[47] Further, there is no credible evidence adduced by the appellant to prove there was a conspiracy between the first and second respondents to injure the appellant. The only evidence adduced by the appellant to support
F their case for conspiracy are the letters between the appellant, first respondent and second respondent. However, such letters are insufficient to prove the tort of conspiracy at all.

[48] In this regard, we are in agreement with the learned High Court Judge that the appellant has failed to prove the essential elements of the tort of
G conspiracy against the respondents.

Our Decision

[49] We are of the considered opinion that the learned High Court Judge made errors which warranted appellate intervention in the appellant's
H appeal. More often than not, an appellate court will not reverse a trial court's findings of facts unless that finding was 'plainly wrong'.

[50] In the light of our above findings, we unanimously allow the appellant's appeal in part.

I

[51] In the premises, we grant the following orders:

(i) The appellant's appeal against the first respondent is allowed in part:

(a) The first respondent is to pay the appellant, the sum of RM3,710,465.75 as LAD for delay in delivery of vacant possession calculated from 5 June 2015 until 30 December 2015;

(b) The first respondent shall pay interest on the sum of RM3,710,465.75 at the rate of 5% per annum from 22 November 2018 (date of the judgment of the High Court) until full and final payment.

(ii) Cost here and below in the sum of RM30,000 to be paid by the first respondent to the appellant subject to allocator;

(iii) The appeal against the second respondent is dismissed; and

(iv) The appellant shall pay cost of RM10,000 to the second respondent subject to allocator.

[52] The decision of the learned High Court Judge of 18 July 2018 is varied accordingly.